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November 24, 2004

Honorable Mike McCarter
Workers' Compensation Court
1625 11th Avenue
P.O. Box 537
Helena, MT 59624-0537

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OFFICE OF
WORKER'S COMPENSATION JUDGE
HELENA, MONTANA

Re: *Rausch, et. al. v. Montana State Fund*
Ruhd v. Liberty Northwest Insurance Corp.
WCC No. 9907-8274R1

Dear Judge McCarter:

Thank you for your letter of November 17, 2004 relative to the proposed summons. We suggest a status conference at the Court's earliest convenience to discuss the confidentiality provisions. Our comments are discussed below.

First, addressing the role of Common Fund counsel, we feel it is incumbent counsel receive sufficient information to determine whether impairment awards have been properly rendered on any particular claimant, including determining the impairment rating, and the dates and payments of impairment awards. Our duties also would include making sure that permanent total claimants are properly classified and that impairment ratings have been timely given and paid. We are aware of longstanding temporary total claimants who should be receiving permanent total benefits and corresponding impairment awards.

Second, I read your decision in *Miller v. Montana State Fund*, and it is clear that the Court is struggling with the possible confidentiality of certain information that would be provided to counsel. I concur in your analysis of the relative privacy interests of the claimants. In short, the filing of a claim for workers' compensation would seem to waive any reasonable expectation of privacy in matters related to statutory benefits, including impairment ratings. Ratings are meaningless absent some statutory entitlement under the provisions of the workers' compensation law. Of course, Common Fund counsel is only interested in information relating to impairment awards which would enure to the benefit of each claimant.

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The right of privacy is a right designed for the protection of individuals. It would indeed be ironic that a person's right of privacy would deprive him of a benefit under a statutory scheme he knows little or nothing about. Moreover, because numerous entities including the insurers, adjusters, vocational consultants, IME doctors, attorneys and department agencies all see any given claimant's medical records, it does not seem a violation of a claimant's privacy expectations to allow common fund counsel to review information to insure he receives an additional benefit under a statutory scheme which expressly waives its privacy to medical records. This is especially so when common fund counsel are subject to a Court imposed protective order, and counsel are working as officers of the Court to insure the decision in *Ruhd* is fully implemented.

Third, I am most concerned with delay. A possible compromise short of having the Montana Supreme Court address this issue in light of the *St. James Hospital* case, would be to hire someone to redact names from records or appoint a special master familiar with workers compensation classification and medical issues. I am thinking here, of a former adjuster, knowledgeable paralegal, or a workers' compensation lawyer to review files. A special master could report to the Court and to counsel for the Common Fund as well as to a representative of the insurers. In this way, adequate protection can be achieved consistent with the Courts' rulings in *Miller* and *St. James Hospital*.

It is my view, the information that you request pursuant to the summons, would not involve confidential information triggering the privacy concerns that the Montana Supreme Court had in the *St. James Hospital* case. I believe the procedure we had in the State Fund case adequately protected the rights of all parties.

Sincerely yours,

Monte Beck

Monte D. Beck, Esq.

*Signed
By JBuchack
for mBeck*

C: Steve Roberts, Esq.
Lon Dale, Esq.
Larry Jones, Esq.

MDB:gb